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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DARNELL JAMES MITCHELL,

Defendant and Appellant.

A130438

(Lake County
Super. Ct. No. CR918253)

Darnell James Mitchell appeals from a judgment upon his plea of no contest to assault with intent to commit rape (Pen. Code,¹ § 220, subd. (a)) and the admission that he suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and two prior prison terms (§ 667.5, subd. (b)). He contends that: (1) the court erred in imposing a one-year prior prison term enhancement because the enhancement had already been imposed in a prior case; (2) the abstract of judgment failed to include the custody credits awarded in Case No. CR917223; (3) he is entitled to additional presentence credits; and (4) the abstract of judgment erroneously included a \$4,000 restitution fine. We agree with defendant's first two contentions, and modify the judgment accordingly.

FACTUAL BACKGROUND

On June 26, 2009, an information was filed charging defendant with rape (§ 261, subd. (a)(2)); rape of an intoxicated person (§ 261, subd. (a)(3)); lewd and lascivious act on a child (§ 288, subd. (c)); assault with intent to commit rape; and giving false information to a police officer in violation of section 148.9, subdivision (a). The

¹ All further statutory references are to the Penal Code.

information further alleged a prior serious felony conviction, one prior strike conviction (§ 667, subds. (b)-(i)) and three prior prison terms. The charges stemmed from an incident in which defendant and two victims were at a playground and drinking alcohol. Defendant assaulted one victim by touching her chest and trying to take off her bra. This victim fled the playground and returned later with friends to find defendant on top of the second victim. Both defendant's and the victim's pants were pulled down.

On July 10, 2009, the court sentenced defendant in Case No. CR917223 for a felony violation of failure to notify the last registering agency of a change of address (§ 290.013, subd. (a)).² In that case, defendant pled no contest to section 290.013, subdivision (a), and admitted that he suffered a prior prison term due to a 2003 conviction³ for failing to register as a sex offender. In sentencing defendant, the court imposed the upper term of three years on the section 290.013 offense and a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b) for the 2003 prior conviction. At the time of the sentencing, the proceedings in this case were ongoing.

On August 24, 2009, defendant pled no contest to assault with intent to commit rape and admitted suffering one prior strike conviction and serving two prior prison terms. The sentencing hearing was held on October 5, 2009. The court imposed the upper term of six years on the assault count and doubled the term of imprisonment for the prior strike conviction. The court also imposed two one-year enhancements for the two prior prison terms. Finally, the court imposed a consecutive sentence in Case No. CR917223—a subordinate term of eight months for the section 290.013, subdivision (a) offense plus a one-year enhancement for the prior prison term under section 667.5, subdivision (b) for a total aggregate term of 15 years and eight months.

² This court granted defendant's unopposed request for judicial notice of the records of the prior case on November 2, 2011.

³ The information incorrectly states that the prior conviction was suffered in 2004. The parties concede that the information's reference is a typographical error.

DISCUSSION

Defendant contends that the trial court erroneously imposed a prior prison term enhancement resulting from the 2003 Lake County conviction because it had imposed the same enhancement in Case No. CR917223. The record confirms that the court did so; the Attorney General concedes the error.

“Section 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense.” (*People v. Tassell* (1984) 36 Cal.3d 77, 90; overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.) Enhancements that are based on prior convictions are status enhancements, and can be added only once as a step in arriving at the aggregate sentence. (*People v. Tassell, supra*, at p. 90; *People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057.) Here, the trial court, in imposing the aggregate term of 15 years and eight months, erred in enhancing the sentence twice for the same 2003 prior prison term. We therefore strike the one-year enhancement pursuant to section 667.5, subdivision (b), attributable to the 2003 prior prison term in Case No. CR918253.

Defendant also contends that he was entitled to conduct credits in this case. The court awarded defendant credits in Case No. CR917223 but did not award credits in Case No. CR918253, noting that those credits would be awarded by the Department of Corrections. The parties agree that the abstract of judgment in Case No. CR917223 does not include an award of credits and that it must be amended to include the award of 170 actual days and 84 days conduct credits, for a total of 254 days. We order that the abstract of judgment in Case No. CR917223 be amended accordingly.

Defendant further argues that he is entitled to actual credits of 97 days plus conduct credits for the period between the date he was sentenced to prison in Case No. CR917223, July 10, 2009, and the date he was sentenced to prison in Case No. CR918253, October 5, 2009.⁴ We disagree. The court, in imposing an aggregate term in both cases on October 5, 2009, did not award defendant credits for this period, stating

⁴ We calculate this period of time to be 87 days.

that defendant “does not have any credits on [Case No.] CR918253 as the Department of Corrections will be awarding those credits to him.”

The trial court was correct in ruling that any credits for the period between the sentencing in Case No. CR917223 and Case No. CR918253 would be determined by the California Department of Corrections and Rehabilitation (CDCR). When the court sentenced defendant in Case No. CR917223 on July 10, 2009, defendant was remanded to the custody of the sheriff for delivery to the CDCR. He was thereafter in the constructive custody of the CDCR serving his sentence in Case No. CR917223, albeit in local custody because he had the pending matter in Case No. CR918253. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 311.) As the court explained in *People v. Bruner* (1995) 9 Cal.4th 1178, 1183, under these circumstances, defendant was not entitled to presentence credits.

“[S]ection 2900.5, subdivision (b) provides that presentence credits shall be given ‘only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.’ ” (*People v. Bruner, supra*, 9 Cal.4th at p. 1183.) The *Bruner* court explained that “the purpose of section 2900.5 is to ensure that one held in pretrial custody on the basis of unproven criminal charges will not serve a longer overall period of confinement upon a subsequent conviction than another person who received an identical sentence but did not suffer preconviction custody. However, we observed ‘[t]here is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant’s liberty.’ ” (*Id.* at pp. 1183-1184, quoting *In re Rojas* (1979) 23 Cal.3d 152, 156.) The trial court correctly determined that defendant was not entitled to presentence credit for the time he spent in the constructive custody of the CDCR awaiting the resolution of Case No. CR918253.

Finally, defendant asserts that the abstract of judgment erroneously included a \$4,000 restitution fine because the court ordered that he pay \$2,800. Our reading of the reporter's transcript shows, however, that the court imposed the \$4,000 restitution fine. At the hearing, the court stated: "It is further the judgment of the Court that the defendant pay a restitution fine under Penal Code section 1202.4(B) of \$2,800 and that he pay an additional \$2,800—I'm sorry, \$4,000 and that he pay an additional \$4,000 parole revocation fine under Penal Code section 1202.45. That parole revocation fine is stayed unless the defendant's parole is revoked." As the record reflects, the court initially misspoke when it said \$2,800 and corrected itself, imposing the \$4,000 fine. The abstract of judgment states the correct amount of restitution.

DISPOSITION

The judgment is modified to strike the one-year enhancement pursuant to section 667.5, subdivision (b), attributable to the 2003 prior prison term in Case No. CR918253. The judgment is also amended to reflect the court's award of 170 actual days and 84 days of conduct credits for a total of 254 days in Case No. CR917223. The trial court is directed to prepare an amended abstract of judgment and to forward a copy to the CDCR. As so modified, the judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.